

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BARBARA RIVARD-CROOK; BILL
CROOK, RAMON CORONA; MONIQUE
DECHAIINE; CHARLES DRAKE, JR.;
LENORA HAYES; RISA HERRERA; NATE
IMAHARA; ERIKA KNAPP; SANDRA
LAUE; JOHN LAWRENCE; ARCELIA
MALDONADO; KELLY STEVENS; RICK
WRIGHT,

Plaintiffs,

v.

ACCELERATED PAYMENT
TECHNOLOGIES, INC., a Delaware
Corporation; VEGAS HOLDING CORP., a
Delaware Corporation; GREAT HILL
PARTNERS, LLC, a Massachusetts
Corporation; GREAT HILL EQUITY
PARTNERS III, L.P., a Delaware Limited
Partnership; GREAT HILL EQUITY
PARTNERS iv, l. p., a Delaware Limited
Partnership; and DOES 1 through 100,
inclusive,

Defendants.

Case No. 2:10-cv-02215-MMD-GWF

ORDER

(Defendants' Motion for Partial Summary
Judgment – dkt. no. 138)

AND ALL CONSOLIDATED ACTIONS

1 **I. INTRODUCTION**

2 This is a contract dispute regarding the payment of commissions between
3 Plaintiffs and their employer, Defendant Accelerated Payment Technologies, Inc.
4 ("APT"). Plaintiffs are all former or current employees of APT and its predecessor, CAM
5 Commerce Solutions ("CAM").¹ Plaintiffs allege they are entitled to the payment of
6 residual commissions on customer accounts they acquired for APT under various and
7 differing commission payment structures from Plaintiffs' dates of hire through October,
8 2010. Defendants, APT and various corporately related entities, maintain that Plaintiffs
9 lack any contractual right to the disputed commissions.

10 Before the Court is Defendants APT, Vegas Holding Corp., Great Hill Partners,
11 LLC, Great Hill Equity Partners III, LP, and Great Hill Equity Partners IV, LP's
12 (collectively "Defendants") Motion for Partial Summary Judgment. (Dkt. no. 138.)
13 Defendants seek the Court's determination that Plaintiffs are not entitled to any payment
14 of post-termination commissions. However, because questions of material fact remain
15 with respect to the terms of the agreement governing the payment of commissions in
16 place before June, 2006, the Court denies Defendants' Motion.

17 **II. BACKGROUND**

18 **A. Factual Background**

19 APT markets and sells software and services that enable businesses to process
20 credit card payments and communicate those payments to the business' inventory,
21 accounting, banking, and other data systems. As payment for providing these services,
22 APT takes a small percentage of each credit card swipe of the customer-business. Each
23 Plaintiff is a Merchant Sales Representative ("MSR") in charge of selling APT's services
24 to various businesses. Part of an MSR's compensation is payment of a commission on
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27 ¹ On June 9, 2008, CAM entered into an Agreement and Plan of Merger whereby CAM
28 became a wholly owned subsidiary of Defendant Vegas Holding Group. On May 25,
 2010, CAM changed its name to APT. For simplicity sake, the Court will refer to the
 company throughout the Order simply as APT.

1 each account the MSR acquires for the company. This commission is calculated as a
2 percentage of APT's revenue stream flowing from the credit card swipes.

3 Before June, 2006, Plaintiffs allege that their commissions were determined
4 pursuant to a verbal agreement ("Agreement I"), under which MSRs received a 10%
5 commission on any non-reseller account and an 8% commission on any reseller
6 account² for the life of the respective account. Plaintiffs further allege that Agreement I
7 provided for APT's continued payment of the commission after an MSR's employment
8 was voluntarily or involuntarily terminated. Plaintiffs assert that they received a lower
9 base salary in exchange for this annuity-type commission structure.

10 In May, 2006, APT created the "X-Charge Standard Commission Plan for CAM
11 Inside Sales Representatives" ("Agreement II"). (Dkt. no. 147-2, Ex. 1.) Under this plan,
12 MSRs received 10% of the monthly revenue generated from non-reseller accounts for
13 the life of the account, and up to 8% of the monthly revenue generated from reseller
14 accounts for five years. (*Id.*) Agreement II also included language terminating ATP's
15 obligation to pay the commission upon termination of an MSR's employment. (*Id.*) This
16 compensation plan became effective for each employee upon signature and the various
17 Plaintiffs signed Agreement II between June, 2007, and June, 2008.³ (Dkt. nos. 141-2 –
18 141-7.) Plaintiffs also signed acknowledgments of a 2006 and 2008 Employee
19 Handbook, which also detailed that "eligibility for any commission ends on the last day of
20 employment." (Dkt. nos. 142-6 – 142-8.)

21 Then, in 2010, APT once again changed the commission structure. Under this
22 agreement ("Agreement III"), APT eliminated the perpetual commission structure, and
23 reiterated the prohibition on post-termination commissions. (See Dkt. no. 141-9, Ex. E.)
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26 ² For purposes of this Motion, the distinction between reseller and non-seller accounts is
not relevant.

27 ³ Defendants have not presented evidence that Agreement II was signed by Plaintiff
Erika Knapp. However, Defendants have shown that Ms. Knapp signed an
28 acknowledgement of the 2006 Employee Handbook, which also contained the
prohibition of receipt of post-termination commissions. (Dkt. no. 139-4.)

1 Additionally, Agreement III stated that "effective August 1, 2010, all previous
2 Compensation Plans are considered null and void." (*Id.*) Agreement III further provided:

3 Payment of Existing Residual Commissions will terminate
4 and cease to be paid after December 31, 2010. No new
5 merchant processing volume will be included in the
6 calculation of existing residual commissions after July 31,
7 2010. Payment of all Existing Residual Commissions will
8 cease as of the date of separation from the Company. No
9 Existing Residual Commissions will be paid after December
 31, 2010. If an employee separates employment prior to
 December 31, 2010, payment of all Existing Residual
 Commissions terminates as of the date of separation of the
 employment.

10 (*Id.*) This agreement was signed by all Plaintiffs. (Dkt. nos. 141-9 – 141-14, Ex. E.)
11 Agreement III's commission structure was then repeated in a 2011 document that all
12 Plaintiffs signed as well. (Dkt. nos. 142-1 – 142-3, Ex. G.)

13 **B. Procedural Background**

14 On November 1, 2010, APT allegedly stopped paying Plaintiffs' residual
15 commissions on accounts acquired under Agreement I and Agreement II, prompting
16 Plaintiffs Rivard-Crook, Crook, Corona, DeChaine, Drake, Hays, Herrera, Imahara,
17 Knapp, Laue, Lawrence, Maldonado, Stevens, and Wright to bring this lawsuit. The
18 lawsuit was consolidated with nearly identical suits brought by Plaintiffs Granat, Gautier,
19 Brennan, Connors, Maglaya, and Bright. On December 17, 2012, Plaintiffs filed an
20 Amended Complaint adding various corporate defendants involved in the acquisition and
21 merger of APT. Defendants now move for partial summary judgment on Plaintiffs' claims
22 for post-termination commissions.

23 **III. DISCUSSION**

24 **A. Legal Standard**

25 The purpose of summary judgment is to avoid unnecessary trials when there is no
26 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
27 F.3d 1468, 1471 (9th Cir.1994). Summary judgment is appropriate when "the pleadings,
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1 depositions, answers to interrogatories, and admissions on file, together with the
2 affidavits, if any, show there is no genuine issue as to any material fact and that the
3 movant is entitled to judgment as a matter of law.” See *Celotex Corp. v. Catrett*, 477
4 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if there is a
5 sufficient evidentiary basis on which a reasonable fact-finder could find for the
6 nonmoving party and a dispute is “material” if it could affect the outcome of the suit
7 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).
8 Where reasonable minds could differ on the material facts at issue, however, summary
9 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
10 1995). In evaluating a summary judgment motion, a court views all facts and draws all
11 inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
12 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

13 The moving party bears the burden of informing the court of the basis for its
14 motion, together with evidence demonstrating the absence of any genuine issue of
15 material fact. *Celotex*, 477 U.S. at 323. Once the moving party satisfies Rule 56’s
16 requirements, the burden shifts to the party resisting the motion to “set forth specific
17 facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The
18 nonmoving party “may not rely on denials in the pleadings but must produce specific
19 evidence, through affidavits or admissible discovery material, to show that the dispute
20 exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do
21 more than simply show that there is some metaphysical doubt as to the material facts.”
22 *Bank of Am. v. Orr*, 285 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The
23 mere existence of a scintilla of evidence in support of the plaintiff’s position will be
24 insufficient.” *Anderson*, 477 U.S. at 252. Although the parties may submit evidence in an
25 inadmissible form, only evidence which might be admissible at trial may be considered
26 by a trial court in ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c).

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1 **B. Analysis**

2 Defendants assert that they are entitled to partial summary judgment because
3 Plaintiffs' written agreements establish that there was no obligation to pay post-
4 termination commissions. Defendants further assert that any prior, verbal agreement is
5 barred by the parol evidence rule. Defendants additionally argue that even if the Court
6 could consider the alleged oral agreement, the agreement is nullified by the terms of
7 Agreement III. However, Defendants misconstrue the allegations in the Complaint and
8 fail to meet their burden in seeking summary judgment.

9 Defendants' argument that Agreement II, Agreement III, and the employee
10 handbooks expressly prohibit receipt of post-termination commissions fails to address
11 Plaintiffs' contention. Plaintiffs do not challenge the validity of the prohibition of post-
12 termination commissions contained in Agreement II, Agreement III or the employee
13 handbooks. Rather, Plaintiffs assert that they are entitled to post-termination
14 commissions on the accounts they acquired prior to the effective date of those
15 Agreements and pursuant to the compensation structure of Agreement I. In other words,
16 it is undisputed that Plaintiffs are not entitled to post-termination commissions for
17 accounts acquired after implementation of Agreement II. The allegations in the
18 Complaint, however, are that although Agreement II affirmatively established the
19 compensation structure and governed the relationship of the parties moving forward from
20 its effective date, it did not reach back and affect commissions already earned. Thus,
21 Agreement II and Agreement III's prohibition on the receipt of post-termination
22 commissions does not definitively settle the matter because Plaintiffs' contentions rest
23 on the alleged terms of Agreement I.

24 For this same reason, Plaintiffs' reference to a prior verbal agreement does not
25 implicate the parol evidence rule. The parol evidence rule prohibits only in the admission
26 of evidence of prior or contemporaneous verbal agreements or negotiations "*that would*
27 *change the contract terms* when the terms of a written agreement are clear, definite, and
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1 unambiguous.” *Ringle v. Bruton*, 86 P.3d 1032, 1037 (Nev. 2004) (emphasis added).
2 “[P]arol evidence *is* admissible to prove a separate oral agreement regarding any matter
3 not included in the contract.” *Id.* (emphasis added). Thus, the parol evidence rule would
4 not bar evidence of a term allowing for post-termination commissions in Agreement I
5 because that prior verbal agreement would not change the terms of Agreement II.
6 Although Defendants correctly note that the prohibition against post-termination
7 commissions is an express term contained in Agreement II, Agreement II only became
8 effective upon signature of the employee—established as between June 2007 and June
9 2008 for the various Plaintiffs. Consequently, payment of post-termination commissions
10 on accounts acquired before that date is a matter not included in Agreement II, and
11 evidence of Agreement I’s oral terms is admissible to show a separate, pre-existing
12 agreement. Because Plaintiffs’ reference to the prior verbal agreement is not an attempt
13 to interpret or invalidate an unambiguous term in Agreement II, the parol evidence rule is
14 inapplicable.

15 Thus, to demonstrate as a matter of law that Plaintiffs have no contractual right to
16 payment of the post-termination commissions, Defendants must show one of two things.
17 First, Defendants could show that Agreement I did not allow for the payment of post-
18 termination commissions. Second, Defendants could show that Agreement II,
19 Agreement III, or the employee handbooks required Plaintiffs to relinquish their rights
20 under Agreement I as consideration for of these subsequent agreements. However, as
21 discussed below, Defendants fail to meet their burden on either of these showings.

22 First, Defendants’ evidence is insufficient to demonstrate that no questions of
23 material fact remain with respect to Agreement I’s treatment of post-termination
24 commissions. Defendants present the deposition testimony of two Plaintiffs that they did
25 not expect post-termination commissions (dkt. nos. 139-6 at 9-10, 139-7 at 11-12), the
26 deposition testimony of APT’s former CEO that he did not consider payment of post-
27 termination commissions a legal duty (dkt. nos. 140-1, 140-2) and a declaration of APT’s
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1 former CFO that APT never paid post-termination commissions (dkt. no. 138-1).
2 However, even without considering Plaintiffs' evidentiary objections, this evidence is
3 insufficient to definitively establish that Agreement I did not provide for post-termination
4 commissions. Although the expectations of two Plaintiffs, the legal conclusions of the
5 CEO, and the business practices of APT tend to support Defendants' position, the Court
6 cannot conclude that, given this evidence, no reasonable fact-finder could find for
7 Plaintiffs. This is especially true considering: (1) the statements of the two Plaintiffs
8 were made in the context of questions about the *written* agreements; (2) Plaintiffs
9 produced statements of the CEO referencing his concern that the right to post-
10 termination commissions be preserved; and (3) no evidence has been presented that
11 any pre-2006 employee was, in fact, terminated such that an obligation to pay post-
12 termination commissions had actually arisen in APT's business practices.⁴ Thus,
13 viewing the facts in the light most favorable to Plaintiffs, questions of material fact
14 relating to Agreement I's treatment of post-termination commissions preclude summary
15 judgment.

16 Second, Defendants misconstrue the law in arguing that the subsequent
17 agreements eliminated obligations due and owed under Agreement I. Defendants argue
18 that "as an at-will employer, APT had the right to make unilateral changes to the terms
19 and conditions of employment, including commissions plans." (Dkt. no. 138 at 17.) This
20 is a correct statement; however, the employer can only make unilateral *prospective*
21 changes. See *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 105-106 (Nev. 2008).
22 An employer cannot alter obligations already due and owed for an employee's finished
23 performance, even if the employee is classified as at-will.⁵ See *id.* Thus, the only
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25 ⁴ Additionally, the mere fact that APT had not paid does not necessarily mean that they
26 were not obligated to pay.

27 ⁵ Indeed, if an employer and employee agree to a \$40,000 salary in Year 1, and the
28 employee performs his labors in Year 1, the employer may subsequently alter the terms
for Year 2 and pay a salary of \$30,000. However, that unilateral revision applies only to
Year 2; it does not retroactively reduce the salary for Year 1.

1 mechanism by which APT could have legally ended the alleged existing and perpetual
2 obligations incurred under Agreement I was to enter into a separate agreement that
3 acted as a novation or an accord and satisfaction of its pre-existing obligations.

4 As to this issue, Defendants assert that the language of Agreement III was
5 sufficient to sever any obligation owing under Agreement I. The necessary inference
6 under this argument is that by signing Agreement III, Plaintiffs agreed to immediately
7 relinquish all rights to perpetual commissions due and owing under Agreement I. Under
8 this construction, Agreement III is an accord itself as satisfaction of APT's obligations
9 under Agreement I. See Restatement (First) of Contracts § 418 (1932) ("A subsequent
10 contract may itself be accepted as immediate satisfaction and discharge of a pre-existing
11 contractual duty, or duty to make compensation; and if so accepted the pre-existing duty
12 is discharged and is not revived by the debtor's breach of the subsequent contract.");
13 *Johnson v. Utile*, 472 P.2d 335 (Nev. 1970). In other words, the Court must infer that for
14 the consideration of continued employment and a revised compensation plan, Plaintiffs
15 agreed to relinquish all rights to perpetual commissions under Agreements I and II—
16 including rights to post-termination commissions under Agreement I—and to continue to
17 sell APT's products and services.

18 However, although the language of Agreement III purports to eliminate APT's
19 perpetual obligations incurred under all previous agreements, questions of fact remain
20 as to whether the language in Agreement III in fact was an accord itself as satisfaction of
21 APT's pre-existing obligations to pay commissions earned under Agreement I. Under
22 Nevada law, "[t]o establish an accord and satisfaction, it must be clearly shown that ' . . .
23 there was a meeting of the minds of the parties, accompanied by a sufficient
24 consideration.'" *Mountain Shadows of Incline v. Kopsho*, 555 P.2d 841, 842 (Nev.
25 1976), *quoting Walden v Backus*, 408 P.2d 712, 713-14 (Nev. 1965). Here, whether
26 Agreement III is truly an accord is suspect. The language in Agreement III appears on
27 its face to be much more of a unilateral elimination of any pre-existing, continuing
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1 obligations than a mutual agreement to satisfy those obligations. Further, the
2 consideration to satisfy APT's obligations under previous agreements seems lacking.
3 There is no consideration in Agreement III other than continued employment and the
4 new compensation plan. Viewing the facts in the light most favorable to Plaintiffs, this
5 would only reasonably be sufficient for Plaintiffs' continued promise to promote and sell
6 APT's goods and services—not to relinquish a contractual right to perpetual
7 commissions as well. Consequently, as the evidence does not clearly show a meeting of
8 the minds or sufficient consideration, the Court cannot determine that Agreement III was
9 an accord itself as satisfaction of Agreement I.

10 Defendants have not provided sufficient undisputed evidence to show that
11 Plaintiffs cannot establish a right to post-termination commissions under Agreement I or
12 that the parties agreed that Agreement III satisfied APT's pre-existing obligations under
13 Agreement I. Defendants thus have not met their burden of showing entitlement to
14 judgment as a matter of law. Defendants' Motion must be denied.

15 **C. Discovery and Evidentiary Issues**

16 Plaintiffs' Response to Defendants' Motion raised a request to deny summary
17 judgment under Fed. R. Civ. P. 54(d) because Defendants have not provided production
18 of various materials requested in discovery. At the time of Defendants' Motion and
19 Plaintiffs' Response, a separate motion under LR IB-3 for the Court to review the
20 Magistrate Judge's Order granting Plaintiffs' Motion to Compel was pending. Given the
21 Court's ruling on the Motion, the Court need not reach the Rule 54(d) request or the
22 discovery issues. As the Court has since affirmed the Magistrate Judge's Order, the
23 Court trusts that Defendants have now complied with the Order on the Motion to
24 Compel.

25 Additionally, both Plaintiffs and Defendants included evidentiary challenges to the
26 opposing parties' evidence in their filings. This Order does not constitute a ruling on
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1 those objections. The parties may still seek to exclude evidence, but must bring such a
2 request in the form of a motion so that the Court may rule on it.

3 **III. CONCLUSION**

4 It is therefore ordered that Defendants' Motion for Partial Summary Judgment is
5 denied.

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7 DATED THIS 7th day of January, 2014.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE